FCC 95-273

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Price Cap Performance Review for Local Exchange Carriers	)	**CC Docket No. 94-1**

ORDER

Adopted: June 29, 1995 **Released:** June 30, 1995

By the Commission:

I. INTRODUCTION

1. On March 30, 1995, the Commission issued an order making interim revisions to its price cap rules for local exchange carriers (LECs).[1] On May 9, 1995, Bell Atlantic and Southwestern Bell Telephone Company (petitioners) jointly petitioned the Commission to partially stay the *First Report and Order*, pending disposition of their petition for review of that order, filed in the United States Court of Appeals for the District of Columbia.[2] We find that petitioners have failed to show that they are entitled to the relief they have requested. We therefore deny their motion for stay.[3]

---

[1] Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, FCC 95-132 (released Apr. 7, 1995) (*First Report and Order*).

[2] Bell Atlantic and SWB Joint Petition for a Partial Stay and for Imposition of an Escrow or Accounting Mechanism Pending Judicial Review (Joint Petition); Bell Atlantic Telephone Companies v. F.C.C., Petition for Review, Docket No. 95-1217 (D.C. Cir. Apr. 19, 1995); Bell Atlantic Telephone Companies v. F.C.C., Petition for Review, Docket No. 95-1219 (D.C. Cir. Apr. 20, 1995); Southwestern Bell Telephone Company v. F.C.C., Docket No. 95-1234 (D.C. Cir. Apr. 27, 1995).

[3] Petitioners also requested a stay of our order in Price Cap Regulation of Local Exchange Carriers: Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179 (released April 14, 1995) (*Add-back Order*). That portion of the petitioners' request is being addressed in a separate order, together with a separate petition for stay filed by the Ameritech

II. PROCEDURAL ISSUES

2. MCI Telecommunications Corporation (MCI) filed an opposition to the Joint Petition one day after the specified date of May 16, 1995. In support of its motion to accept its late-filed opposition (MCI Motion), MCI suggests that "[t]here is some conflict" as to whether Section 1.4(h) of the Commission's Rules,[4] applies for purposes of the due date for filing oppositions to stay requests.[5] In addition, MCI claims that the one-day "delay will [not] prejudice parties since reply comments on stay motions may not be filed."[6]

3. Section 1.45(d) of the Rules clearly states that "[t]he provisions of [Section] 1.4(h) shall not apply in computing the filing date for oppositions to a request for stay . . . ."[7] We therefore reject MCI's suggestion that our rules are not sufficiently clear as to the due date for filing oppositions to a stay request. We also reject MCI's statement that the one-day delay in filing its opposition will not prejudice other parties because replies cannot be filed. The Commission shortened the filing period for oppositions to requests for stay and other requests for temporary relief and precluded the filing of replies to such oppositions "[i]n view of [parties'] need for prompt action on [such] requests . . . ."[8] For these reasons, we reject MCI's motion to accept its late-filed opposition and we dismiss its late-filed opposition.

III. BACKGROUND

4. We replaced rate-of-return regulation for the Bell Operating Companies and GTE Operating Companies with price cap regulation in 1990, with the new plan taking effect on January 1,

---

Operating Companies.

[4] 47 C.F.R. § 1.4(h).

[5] MCI Motion at 2 n.2; *see also* Section 1.4(h) of the Rules (in general, provides parties an additional three days to respond to a pleading if the filing period for responding to the pleading is 10 days or less, and if the party has been served by mail).

[6] MCI Motion at 2.

[7] *See also* Amendment of Section 1.45(d) of the Commission's Rules, 4 FCC Rcd 5585, 5585 (1989) ("the three additional days when service is by mail [under Section 1.4(h)] does not apply to oppositions to a request for stay . . . .").

[8] Amendment of Parts 0 and 1, Rules and Regulations, 12 FCC2d 859 (1968).

1991.[9] The plan established in the *LEC Price Cap Order* created a price cap index (PCI) for each of several different categories of LEC access services. Rates that conform to the limits set by a LEC's PCI are presumed lawful and permitted to take effect under streamlined review. Above-cap rate filings carry a heavy burden of justification and a strong likelihood of suspension. Under the original price cap plan, each LEC's PCI was adjusted annually based on a measure of inflation that embodies economy-wide productivity gains and price changes,[10] minus a productivity factor (or "X-Factor"). The X-Factor reflected the amount by which LEC productivity historically had exceeded that of the economy as a whole plus a consumer productivity dividend of 0.5 percent. The PCI could be adjusted to account for cost changes caused by changes in administrative, legislative, or judicial action beyond the control of the carrier, and not otherwise reflected in the price cap formula.[11] We set the X-Factor for access service baskets at 3.3 percent in the *LEC Price Cap Order*, based on the average of two studies of historical LEC productivity conducted by the Commission. We also established an optional higher X-Factor of 4.3 percent.

5. In the *First Report and Order*, we adopted several interim revisions to the LEC price cap plan pending adoption of long-term revisions to the plan. First, we increased the productivity offset in the price cap formula. We had based the original 3.3 percent X-Factor on the average of two historical LEC productivity studies: the Spavins-Lande Study, which examined long-term pricing trends, and the Frentrup-Uretsky Study, which focused on revenue and demand trends from 1984-1990. The consumer productivity dividend was then added to that average. The access price data in the Frentrup-Uretsky Study from the 1984-85 tariff year (the "1984 data point") did not fit the trend described by the 1985-90 data.[12] In the *First Report and Order*, we concluded that the Commission erred in including the 1984 data point in the Frentrup-Uretsky Study. We then recalculated the X-Factor excluding the 1984 data point

---

[9] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6785 (1990) (*LEC Price Cap Order*); *recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[10] In the *LEC Price Cap Order*, we used the Gross National Product Price Index as the inflation measure. *LEC Price Cap Order*, 5 FCC Rcd at 6792-93. In the *First Report and Order*, we replaced our inflation measure with the Gross Domestic Product Price Index. *First Report and Order*, paras. 347-51.

[11] The cost changes which may be permitted exogenous treatment are listed in Section 61.45(d) of the Commission's Rules, 47 C.F.R. § 61.45(d).

[12] *LEC Price Cap Order*, Appendix C, 5 FCC Rcd at 6892-94.

(continuing to use a consumer productivity dividend of 0.5 percent), and found that this resulted in an X-Factor of 4.0 percent.[13] We decided that on a going-forward basis, the corrected minimum X-Factor of 4.0 percent should be used for the interim plan. We then required LECs to reduce their PCIs by .7 percent for each year during the 1990-1994 period that they elected the lower X-Factor of 3.3 percent, so that the PCI for the 1995 annual access tariffs would be the same as it would have been had we excluded the 1984 data point from the Frentrup-Uretsky Study in the *LEC Price Cap Order*.[14] We emphasized that this is a one-time, prospective adjustment to ensure that future rates strike a more appropriate balance between ratepayer and shareholder interests. There is no element of a refund in this adjustment. As we noted, the adjustment does not return to ratepayers any amounts charged to them in previous years.[15]

6. We also, among other things, revised our exogenous cost rules. We established an additional requirement for LECs seeking to treat cost changes resulting from changes in accounting rules exogenously. In addition to showing that the cost change is beyond the control of the carrier and not otherwise reflected in the price cap formula, LECs must show that the accounting rule change results in an economic cost change, i.e., affects the carrier's discounted cash flow.[16] Applying the new standard prospectively we found that accounting changes for certain "other post-employment benefits" (OPEBs) would not be eligible for exogenous treatment. To prevent these cost changes, which had already been included in calculation of the PCIs, from becoming permanently embedded in the interstate access rates and improperly inflating those rates in the future, we also required each LEC to reduce its PCI by an amount equal to the original exogenous cost increase made pursuant to the OPEBs accounting rule change.[17] As with the one-time prospective PCI adjustment related to the revised X-Factor, the PCI adjustment related to OPEBs costs is designed to ensure reasonable future rates. It does not reclaim revenues obtained to date under the LECs' filed tariffs.[18]

---

[13] *First Report and Order*, paras. 205-209.

[14] *Id.* at paras. 245-56.

[15] *Id.* at paras. 252-53.

[16] *LEC Price Cap Performance Review*, paras. 293-296.

[17] *Id.* at paras. 308-10.

[18] *Id.* at para. 309.

IV. PLEADINGS

7. Petitioners seek a stay of the portions of the *First Report and Order* that require them to reduce their PCIs by .7 percent for each year they elected the lower X-Factor of 3.3 percent and by the amount of any exogenous cost increases made pursuant to OPEBs accounting rule changes.[19] They contend that they are entitled to a stay under the four-part test that the courts and the Commission traditionally apply.[20]

8. First, petitioners argue that they are likely to prevail on the merits of their appeal of the *First Report and Order*.[21] They claim that the reinitialization of rates to reflect the correction of the Frentrup-Uretsky study is arbitrary. They assert that the Commission's decision that the original minimum X-Factor of 3.3 percent was too low and the corresponding selection of the new minimum X-Factor of 4.0 percent are unsupported by the evidence and contradicted by the studies on which the Commission relied.[22] They also argue that the Commission failed to offer an adequate justification for the continued use of a 0.5 percent consumer productivity dividend.[23] Petitioners further argue that even if the new minimum X-Factor was correctly selected, requiring the LECs to adjust their current PCIs by .7 percent for each year they selected the 3.3 percent X-Factor constitutes prohibited retroactive rulemaking.[24]

9. Petitioners similarly argue that requiring them to remove past OPEB-based adjustments from current PCIs constitutes prohibited retroactive rulemaking.[25] They further assert that even if the Commission had the authority to order such removal of the past OPEB-based adjustments from their PCIs, the Commission's action was an abuse of its authority, because the Commission failed to explain why these non-economic costs should be removed from the PCIs while other non-economic cost changes that favor the LECs'

---

[19] Joint Petition at 1-2.

[20] Joint Petition at 7.

[21] *Id.* at 8.

[22] *Id.* at 9-14.

[23] *Id.* at 15-16.

[24] *Id.* at 16-18.

[25] *Id.* at 18-20.

customers have not been removed.[26]

10. Second, petitioners argue that they will suffer irreparable harm if a stay is not granted. They maintain that the cumulative effect of both PCI reductions and the higher X-Factor will result in a loss of over $100 million of revenue for each petitioner in the first year. They assert that although the Commission is empowered to permit them to increase their rates to recoup losses incurred as a result of Commission decisions that are invalidated on appeal, it is unlikely that the Commission could successfully exercise that authority in the present case. They claim that ever-expanding competition in the LEC interstate access service markets will prevent them from charging higher rates in the future should they prevail on appeal.[27]

11. Third, petitioners contend that the imposition of a stay will not harm other parties because the Commission can restore their financial position by requiring the LECs to hold moneys received from the interexchange carriers subject to an accounting order or in escrow. Then, if the Commission is upheld on appeal, the difference between what the interexchange carriers paid and the amount they would have paid absent a stay can be returned with interest.[28]

12. Finally, petitioners argue that a stay will not harm the public interest. They assert that if the interexchange market is competitive, competitive forces will compel interexchange carriers to reduce their prices to account for their anticipated recovery of sums subject to the proposed accounting order or placed in an escrow account.[29]

V. DISCUSSION

13. In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Jobbers*), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir 1977). Under that test, petitioners must demonstrate

---

[26] *Id.* at 20-21.

[27] *Id.* at 22-25.

[28] *Id.* at 25.

[29] *Id.* at 25.

that: 1) they are likely to succeed on the merits on appeal;[30] 2) they would suffer irreparable injury absent a stay; 3) a stay would not substantially harm other interested parties; and 4) a stay would serve the public interest. Petitioners must meet each of these tests in order for the Commission to grant a stay.

14. Petitioners have not satisfied any of the four factors for granting a stay. We will address here only their failure to show that they will suffer irreparable injury if their request for stay is denied and that a stay is in the public interest. Petitioners recognize that monetary loss generally does not constitute irreparable injury.[31] They argue that this general rule does not apply here, however, because adequate compensatory or other corrective relief is not available in the ordinary course of litigation.[32] Recent court decisions suggest that, where appropriate, the agency has discretion, consistent with the Filed Rate Doctrine and the rule against retroactive ratemaking, to consider whether it may be appropriate to permit relief to remedy the effects of an agency order that has been overturned on appeal.[33] The gist of petitioners' claim of irreparable harm is that if their appeal succeeds, and the Commission were to permit LECs to increase their PCIs to recoup losses incurred as a result of the invalidated decision, increased competition in LEC interstate access service markets would prevent the LECs from raising their prices and recouping their lost revenue.[34] This assertion is purely speculative[35] and will not support a claim of irreparable injury.[36]

---

[30] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on the other factors is particularly strong. *Expanded Interconnection of Local Company Facilities*, 8 FCC Rcd 123, 124 n.10 (1992).

[31] *Jobbers* at 925; Joint Petition at 22.

[32] *Id.*

[33] *See Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992); *Public Utilities Commission of State of California v. FERC*, 988 F.2d 154 (D.C. Cir. 1993).

[34] Joint Petition at 23.

[35] *See* Affidavit of Dale R. Kaeshofer, ¶7, attached to Joint Petition ("it is extremely uncertain whether SWBT would be able to recover these losses").

[36] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674-75 (D.C. Cir. 1985).

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the future.[37]

15. Petitioners do not claim that the threatened harm has occurred in the past. Indeed, petitioners argue that competitive conditions would permit them to charge higher prices now, but not in the future.[38] Petitioners offer no proof that the harm is certain to occur in the future, instead speculating that the notion that the marketplace would permit recoupment through higher prices in the future is "simply not realistic."[39]

16. Further, petitioners' claim that the public will not suffer higher prices if a stay is issued does not withstand scrutiny. They argue that competitive forces in the interexchange market will force interexchange carriers to reduce their prices in anticipated recovery of any sums subject to the accounting order or placed in escrow. Specifically, petitioners contend that if the interexchange carriers are certain that the Commission's order will be upheld on appeal and the funds held in escrow eventually will be refunded to the interexchange carriers, those carriers will behave as if the rate reductions had already gone into effect and immediately pass on all of the anticipated recovery in reduced prices to their customers.[40] This argument is purely speculative. Even if the logic of the argument were correct, petitioners have failed to demonstrate that the premise of their argument -- that interexchange carriers will assume that they will receive the escrowed funds at some future date -- is true. Hence, contrary to petitioners' assertion, the record does not demonstrate that interexchange carrier charges to end users will be no higher than they would be if the stay were not granted.[41]

---

[37] *Id.* at 674 (emphasis in original).

[38] Joint Petition at 22-24.

[39] Joint Petition at 24.

[40] Joint Petition at 25.

[41] We note that immediately prior to the Commission's decision in the *First Report and Order*, Bell Atlantic challenged the assertion that the interexchange carriers flow through LEC access charge reductions to end user customers. *See* Bell Atlantic *ex parte* filing in CC Docket No. 94-1, dated March 23, 1995, at 1 (interexchange carriers' interests "are in pocketing

17. The adjustments to LEC PCIs required in the *First Report and Order* will advance, among other things, the public interest goals of just and reasonable rates. We set forth in the *First Report and Order* our reasons for concluding that the PCI adjustments mandated by that decision were necessary to ensure that the LEC rates for interstate services were just and reasonable.[42] Accordingly, we believe that the public interest would not be served by staying the effectiveness of those PCI adjustments, as requested by petitioners. For the foregoing reasons, we find that petitioners have failed to sustain the heavy burden required to justify a stay of any portion of the *First Report and Order.*

VI. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that the joint petition for stay filed by Bell Atlantic and Southwestern Bell Telephone Company is DENIED.

19. IT IS FURTHER ORDERED, that MCI's motion to accept late-filed pleading is also DENIED.

Federal Communications Commission

William F. Caton
Acting Secretary

---

the access reductions we provide"); *id.* at 4 (AT&T suggestion that it flowed through all access charge reductions to end users is "wrong and misleading"). The Joint Petition does not explain why interexchange carriers would be more likely to pass on *anticipated* access charge reductions than they would *actual* access charge reductions.

[42] *First Report and Order*, paras. 201-09; 245-250; 307-10.